IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Markey, P.J., and Whitbeck and Gleicher, J.J.

In re JADEN TAYLOR LEE, Minor

Docket No. 137653

DEPARTMENT OF HUMAN SERVICES,
Petitioner-Appellee,

v

CHERYL LYNN LEE,
Respondent-Appellant,
and

SAULT STE. MARIE TRIBE OF CHIPPEWA INDIANS,
Intervening Respondent-Appellee
/

AMICUS CURIAE BRIEF OF THE AMERICAN INDIAN LAW SECTION OF THE STATE BAR OF MICHIGAN

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INTRODUCTION AND INTEREST OF AMICUS

The American Indian Law Section of the State Bar of Michigan files this amicus curiae brief pursuant to the December 18, 2008 invitation of the Supreme Court of Michigan. This Court in its Order granting leave for this appeal stated:

> The parties shall include among the issues to be briefed (1) whether the term "active efforts" in 25 USC 1912(d) requires a showing that there have been *recent* rehabilitative efforts designed to prevent the breakup of *that particular* Indian family; and (2) whether the "beyond a reasonable doubt" standard of 25 USC 1912(f) requires *contemporaneous* evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated.
>
> The Attorney General and the American Indian Law, Children's Law, and Family Law Sections of the State Bar of Michigan are invited to file briefs amicus curiae by February 24, 2009.

Michigan Supreme Court Order, Docket No. 137653 (December 18, 2008).

The American Indian Law Section is not the State Bar of Michigan itself, but rather a Section of the State Bar of Michigan whose members choose voluntarily to join based on common professional interest. The positions expressed in this brief are that of the American Indian Law Section only, and not the position of the State Bar of Michigan. The State Bar of Michigan, to date, does not have a position on this matter.

The American Indian Law Section has approximately 188 members and the affairs of the American Indian Law Section are administered by an elected Council. The drafting and filing of

this brief by the Corporate Laws Committee of the Section were initially approved by the Council after discussions held at a meeting held in conformance with the Section's bylaws on January 9, 2009. The positions taken in this brief were formally adopted by a vote of the Council after discussion at a meeting held in conformance with the Section's bylaws. The ten Council members who attended the meeting unanimously voted in favor of the positions that are presented in this Amicus Brief.

The subject matter of the positions taken in this Brief is within the jurisdiction of the American Indian Law Section, and the positions taken in this Brief were adopted in accordance with the Section's bylaws. The requirements of State Bar of Michigan Bylaw Article VIII have been satisfied.

STATEMENT OF BASIS OF JURISDICTION

Amicus Curiae concurs with the Statement of Appellate Jurisdiction set forth in the Brief of Appellant Cheryl Lee.

STATEMENT OF FACTS

Amicus Curiae concurs in the Statement of Facts set forth in the Brief of Appellant Cheryl Lee.

SUMMARY OF ARGUMENT

Congress enacted the Indian Child Welfare Act of 1978 as a reaction to the wholesale and practically automatic removal of Indian children from Indian families and tribal communities. Congress's scheme involved the transfer of jurisdiction over Indian children from primarily state courts to tribal courts, and the federal guarantee of procedural requirements that state courts must follow prior to both removing Indian children from Indian families and before terminating the parental rights of Indian parents. Congress intended these federal guarantees both to trump state procedures and to favor Indian parents and Indian tribes. This matter involves the state courts' application of the federal procedural standards mandated in the statute; in particular, the requirement that the State prove that it has provided "active efforts" to prevent the breakup of an Indian family, 25 USC 1912(d), and the requirement that the state court apply the "reasonable doubt" evidentiary standard prior to terminating Indian parental rights, 25 USC 1912(f).

The Court of Appeals below held that the State may satisfy the "active efforts" standard by proving that it provided preventive and rehabilitative services years ago and that more recent efforts are excused on the grounds that they would be "futile." Appellant's Appendix at 26a. The Court of Appeals also refused to apply the "reasonable doubt" standard required by the statute in favor of a "clear and convincing" evidence standard. Appellant's Appendix at 22a.

Amicus Curiae urges reversal of the Court of Appeals decision on two independent grounds. First, the plain language of the Indian Child Welfare Act requires a state to prove that it has provided recent and even ongoing preventive and rehabilitative services to Indian families. If

the state courts merely required "active efforts" at an early stage in a case, but not at later stages, the result would render the implementation of the statute in any given case absurd. Even if this Court were to find the language ambiguous, Congressional intent in requiring "active efforts" is clear in favor of requiring the more recent efforts. Finally, the Court of Appeals' holding that the State can be excused from providing "active efforts" because of the "futility" of those efforts is nothing more than the rewriting of a federal statute by through the adoption of judicially-created exceptions and should be rejected.

Second, the "beyond a reasonable doubt" standard of 25 USC 1912(f) requires contemporaneous evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated. In addition, for the state to meet its burden beyond a reasonable doubt, evidence must speak to harm to the particular child and must show that the parent is either unwilling or unable to change the conditions that led to the removal of the child.

ARGUMENT

I. CONGRESS ENACTED THE INDIAN CHILD WELFARE ACT TO PREVENT THE WHOLESALE REMOVAL OF INDIAN CHILDREN FROM INDIAN COMMUNITIES

Congress enacted the Indian Child Welfare Act ("ICWA") in 1978, PL 95-608; 25 USC 1901-1963, after more than four years of hearings, deliberation, and debate, in order to alleviate a terrible crisis of national proportions – the "wholesale separation of Indian children from their families...." *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for Other Purposes*, H R Rep 95-1386, at 9 (July 24, 1978) ("1978 House Report)[1]; see also *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989). Hundreds of pages of legislative testimony taken from Indian Country over the course of four years confirmed for Congress that many state and county social service agencies and workers, with the approval and backing of many state courts and some federal Bureau of Indian Affairs officials, had engaged in the systematic, automatic, and across-the-board removal of Indian children from Indian families and into non-Indian families and communities. 25 USC 1901(4)-(5); see also *Holyfield*, 490 US at 32-33. State governmental actors following this pattern and practice removed between 25 and

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[1] The text of ICWA, the legislative history, and any draft bills or Congressional materials dealing with ICWA cited in this brief are available at the website of the Native American Rights Fund, <http://narf.org/icwa/federal/lh.htm>.

35 percent of all Indian children nationwide from their families, placing about 90 percent of those removed children in non-Indian homes. *Holyfield*, 490 US at 32-33 (citing *Indian Child Welfare Program*, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93rd Cong, 2d Sess, at 3 (statement of William Byler) (April 8 & 9, 1974) ("1974 Hearings"); see also American Indian Policy Review Commission Task Force Four, *Report on Federal, State, and Tribal Jurisdiction* 79 (July 1976) ("Task Force Four").

In Michigan, the story of Indian child removal was just as staggering and tragic. In a 1973 federal case involving children from the Hannahville Indian Community, a tribal expert witness, Dr. James Clifton, "testified that the assumption of jurisdiction in forced adoption by white courts is a matter of great bitterness among the Indian community." *Wisconsin Potawatomies v Houston*, 393 F Supp 719, 726 (WD Mich 1973). Michigan Indians grow up with oral traditions and stories about the day that a state or church authority figure would show up at the family's house to take away Indian children. E.g., Dunlop, *The Indians of Hungry Hollow* 131-40 (Ann Arbor: University of Michigan Press, 2004) (retelling the story about how Father Aubert from Holy Childhood of Jesus School in Harbor Springs removed the author and his older brother from their family); Grand Rapids Public Library Native American Oral History Project, *The Tree That Never Dies* 142 (Grand Rapids: Grand Rapids Public Library, 1978) ("For years these people [from state agencies] have tried to separate Indian orphans from their people. Move 'em in with white families.") (quoting unidentified Michigan Indian). In 1974, a representative of the Native American Child Protection Council, based in Detroit and serving

urban Indians, alleged before Congress that state officials had engaged in a the "kidnapping" of urban Indian children. *1974 Hearings, supra*, at 161 (Statement of Esther Mays). By the 1970s, one out of 8.1 Indian children in Michigan were adopted out of their families and communities, a rate 370 percent higher than with non-Indians. *Indian Child Welfare Act of 1977*, Hearings before the Senate Select Committee on Indian Affairs, 95th Cong, 1st Sess, at 539 (Aug. 4, 1977) ("1977 Hearings"); *Task Force Four*, *supra*, at 82. One out of 90 Indian children in Michigan were in foster care, a rate 710 percent higher than with non-Indians. *Id.*

A critical aspect to the legislative history of ICWA is the "wholesale" and automatic character of Indian child removal by state actors nationally. As the Executive Director of the Association on American Indian Affairs, William Byler, testified, the "[r]emoval of Indian children is so often the most casual kind of operation...." *1974 Hearings*, *supra*, at 19-20, 23. During the 1974 hearings, witness after witness would testify to the automatic removal of Indian children, often without a scintilla of due process. Byler testified that at the Rosebud Sioux Reservation, state social workers believed that the reservation was, by definition, an unacceptable environment for children and would remove Indian children without providing services or even the barest investigation whatsoever. *1974 Hearings*, *supra*, at 21-23. State actors made decisions to remove Indian children with "few standards and no systematic review of judgments" by impartial tribunals. *1974 Hearings*, *supra*, at 62 (Statement of Dr. Carl Mindell and Dr. Alan Gurwitt). A member of the Sisseton-Wahpeton Sioux Tribe in South Dakota testified that state actors had taken Indian children without even providing notice to Indian

families, with state courts then placing the burden on the Indian parent to prove suitability to retain custody. *1974 Hearings*, *supra*, at 67-69 (Statement of Cheryl DeCoteau). The President of the National Congress of American Indians testified that a state caseworker came to an Indian woman's house without warning or notice and took custody of an Indian child by force. *1974 Hearings*, *supra*, at 224 (Statement of Mel Tonasket). Senator Abourezk, chairman of the Subcommittee on Indian Affairs, stated after hearing much of this testimony:

> [W]elfare workers and social workers who are handling child welfare caseloads use any means available, whether legal or illegal, coercive or cajoling or whatever, to get the children away from mothers they think are not fit. In many cases they were lied to, they given documents to sign and they were deceived about the contents of the documents. [*1974 Hearings*, *supra*, at 463.]

To remedy the problem, Congress created a statute designed to guarantee minimum procedural safeguards for Indian tribes and Indian families in non-tribal adjudicative forums and to clarify jurisdictional gray areas between state and tribal courts. The statute provides that tribal courts have *exclusive* jurisdiction over custody proceedings involving Indian children domiciled in Indian Country. 25 USC 1911(a). Congress borrowed this concept from the Western District of Michigan, in which Judge Engel had reached the same outcome in a 1973 common law decision in a case involving children who were members of the Hannahville Indian Community. *Wisconsin Potawatomies*, 393 F Supp at 734, cited in *Holyfield*, 490 US at 35 n4; cf. *Kobogum v Jackson Iron Co*, 43 NW 602, 605 (Mich 1889) ("[Indian tribes] did not occupy their territory by our grace and permission, but by a right beyond our control. They were placed by the constitution of the United States beyond our jurisdiction, and we had no more right to control their domestic usages than those of Turkey or India."). ICWA provides that tribal courts have

concurrent and *presumptive* jurisdiction over Indian child custody cases where the child is domiciled outside of Indian Country. 25 USC 1911(b); *Holyfield*, 490 US at 36. As in the case at bar, a state court may (assuming certain circumstances) accept or retain jurisdiction over Indian child custody cases in this circumstance, or where a tribal court declines jurisdiction. 25 USC 1911(b), (c).

In cases where a state court has jurisdiction in an Indian child custody case, ICWA provides for minimum procedural guarantees with which each state court must comply. A state court must provide notice to both the Indian parents and the Indian tribe if a state agency is petitioning for foster care placement or termination of parent rights. 25 USC 1912(a). Additionally, in these state court actions, Indian parents have the right to court-appointed counsel. 25 USC 1912(b). If the state court does order a placement, it must give preference to the Indian child's extended family or, failing that, another tribal community placement. 25 USC 1915(a), (b); cf. *Wisconsin Potawatomies*, 393 F Supp at 726 (noting testimony of tribal expert about tribal family law).

Before the state court can order foster care placement or termination of Indian parental rights, the state agency must prove that it has provided "active efforts" to prevent the breakup of the Indian family:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. [25 USC 1912(d)]

Of additional relevance to this matter, the state agency seeking termination of Indian parental rights must prove beyond a reasonable doubt the case for termination:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. [25 USC 1912(f)]

And, importantly, Congress recognized that state law and policy affecting Indian children and families has an enormous impact on the future of Indian tribes as well. Congress found "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe...." 25 USC 1901(3). The United States Supreme Court echoed that finding by relying upon the statements of Calvin Issac, the tribal chief of the Mississippi Band of Choctaw Indians, who stated:

> Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships. [*Holyfield*, 490 US at 34 (quoting *Indian Child Welfare Act of 1978*, Hearings before the Subcommittee on Indian Affairs and Public Lands of the Committee on Interior and Insular Affairs, House of Representatives, 95th Cong, 2d Sess, at 193 (Feb. 9 & Mar. 9, 1978) ("1978 Hearings"))].

Similarly, as Judge Engel noted in the *Wisconsin Potawatomies* case: "If tribal sovereignty is to have any meaning at all in this juncture of history, it must necessarily include the right ... to provide for the care of its young, a *sine qua non* to the preservation of its identity." 393 F Supp at

730. The *Holyfield* Court also relied upon the testimony of experts and studies that demonstrated the destructive effects of placing Indian children in non-Indian families and communities. *Holyfield*, 490 US at 33 & n1 (citing *1974 Hearings*, *supra*, at 46).

The enactment of ICWA, the federal recognition of several Michigan Indian tribes since 1978, and the efforts of the State of Michigan have gone a long way to resolving many of the problems that compelled Congress to enact the statute 30 years ago, but there is a great deal more to be done. In 2006, one study reported that children of color, especially American Indians, remain disproportionately overrepresented in foster care placements in Michigan. Michigan Advisory Committee on the Overrepresentation of Children of Color in Child Welfare, *Equity: Moving Toward Better Outcomes for All of Michigan's Children* 12 (March 2006).

II. "ACTIVE EFFORTS" AS USED IN THE INDIAN CHILD WELFARE ACT REQUIRES RECENT REHABILITATIVE EFFORTS DESIGNED TO PREVENT THE BREAKUP OF THIS PARTICULAR INDIAN FAMILY

A. The Plain, Ordinary Meaning of "Active Efforts" as Used by Congress in ICWA Provision Requires Recent Rehabilitative Efforts Designed to Prevent the Breakup of Cheryl Lee and Jaden Lee.

The plain, ordinary meaning of "active efforts" requires recent efforts designed to prevent the breakup of each Indian family (i.e., the removal of each Indian child). This Court long has

held that its "primary obligation is to discern legislative intent as reflected in the plain language of the statute." *Dimmitt & Owen Fin, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618, 624; 752 NW2d 37 (2008) (footnote omitted). "When the language of a statute is unambiguous, the Legislature's intent is clear, and judicial construction is neither necessary nor permitted." *Id.*

Congress intended the "efforts" to be required by ICWA to be "active" in two key aspects – qualitative and temporal. The first two meanings of the word "active" demonstrate these key aspects:

> 1. engaged in action or activity; characterized by energetic work, motion, etc.: *an active life.*
>
> 2. being in existence, progress, or motion: *active hostilities....*

Random House Webster's College Dictionary 14 (1991); *see also id.* ("6. characterized by current activity, participation, or use: *an active member, an active account.*").

The qualitative aspect concerns the vigor by which the modified activity (here, rehabilitative and preventive "efforts") is performed. E.g., *In re Roe*, 281 Mich App 88; __ NW2d __; 2008 WL 4603462; slip op at 12 n53 (2008) (noting that "majority of jurisdictions interpret 'active efforts' as imposing a higher burden than various states' 'reasonable efforts' requirement'" and collecting cases).[2]

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[2] A clear majority of state courts confronting the issue have found that active efforts requires more than the normal services offered to non-Indian parents. E.g., *In re JS*, 177 P3d 590, 593-4 (Okla App 2008); *South Dakota ex rel JSB*, 691 NW2d 611 (SD 2005); *In re Welfare of Children of SW*, 727 NW2d 144 (Minn App 2007); *Winston J v State of Alaska, Department of Health and Social Services, Office of Children's Services*, 134 P3d 343 (Alas 2006); *In re Interest of Dakota L*, 712 NW2d 583 (Neb App 2006); *In re AN*, 106 P3d 556 (Mont 2005). In choosing to follow the great weight of authority, the South Dakota Supreme Court relied upon "the policy behind ICWA,

And the temporal aspect concerns the timing of the modified activity.[3] E.g., *In the Interest of CD*, __ P3d __; 2008 UT App 477; 2008 WL 5376534, at *9 (Utah App 2008) (holding that previous efforts with the same children and their mother could not be imputed to the children and their grandfather; the opposite outcome "would allow removal as a matter of course, so long as the State could demonstrate that active efforts had been made with any other family member at anytime in the past," which is contrary to ICWA's goal of insuring '"that the permanent removal of an Indian child from the custody of his parent or Indian custodian shall be the last resort"') (citing 25 USC 1931)[4]; Appellant's Appendix at 33a (Judge Gleicher's dissent noting that "an 'active case' is '[a] case that is still pending.'") (quoting Black's Law Dictionary (8th ed).

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especially Congress' intent to achieve uniformity among the states where the interests of Indian children, parents and tribes are concerned . . ." *In re JS*, 177 P3d at 593; see also *Holyfield*, 490 US at 43-44 (noting that Congress intends uniform national application of its statutes).

[3] In other statutes, Congress has used the term "active" to connote *ongoing* activity. For example, "active duty" means "full-time duty" in one of the Armed Forces. 37 USC 101 (18) ("The term 'active duty' means *full-time* duty in the active service of a uniformed service, and includes full-time training duty, annual training duty, full-time National Guard duty, and attendance, while in the active service, at a school designated as a service school by law or by the Secretary concerned.") (emphasis added). Federal energy conservation statutes define "active mode" as "the mode of operation when an external power supply *is connected* to the main electricity supply." 42 USC 6291(36)(B) (emphasis added). Colorado River Basin Project law defines "active storage" to mean "that amount of water *in reservoir storage* ... which can be released through the existing reservoir outlet works." 43 USC 1556(d) (emphasis added). Federal mine safety law defines "active workings" as "any place in a coal mine where miners *are normally required* to work or travel." 30 USC 878(g)(4) (emphasis added).

[4] However, due to the extraordinary facts in that case inapplicable here, the Utah Court did not require additional rehabilitative efforts, since the grandfather in this case was a social worker with the state who, prior to his retirement, received considerable ongoing training on how to be a parent, and in fact trained others on how to be foster parents. *In the Interest of CD* at *12. Whether Cheryl Lee is too much of an expert in child services is not an issue in this case.

The plain, ordinary usage of "active" as used to modify "efforts" requires the application of *both* qualitative and temporal aspects in order to meet Congress's goal of preventing the automatic and wholesale removal of Indian children. The Court of Appeals focused entirely on the qualitative aspect of "active efforts," see Appellant's Appendix at 26a (recognizing the State "made many varied and repeated efforts to provide services to Cheryl Lee..."), while arbitrarily and without justification ignoring the temporal aspect, see *id.* (allowing the State to satisfy the "active efforts" requirement by proving years-old "past" efforts.); *id.* at 24a ("services provided in the past"). Congress never would have intended for state agencies to successfully petition for the termination of parental rights after a hearing in which state witnesses admitted that they had no recent information about a mother's ability to parent, as Judge Gleicher's dissent pointed out. See Appellant's Appendix at 34a.

Related provisions in ICWA strongly compel this reading of "active efforts." The means by which Congress chose to address the Indian child removal problem involved in large part the guarantee of a series of procedural standards that state agencies and state courts must address before they could break up Indian families. Congress first required that in "any" termination proceeding, the state must notify both the Indian family and the relevant Indian tribe or tribes that a petition to terminate has been filed. 25 USC 1912(a). Failing successful notice to the parents and the tribe, the state must notify the Secretary of Interior. *Id.* And after the state successfully notifies all the required parties, the state court termination proceedings must be delayed by 10 days and at least 20 additional days at the request of the tribe or parent. *Id.* Finally,

the state must give the notified tribe notice for purposes of providing "culturally relevant services." Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings* D.2, 44 Fed Reg 67584, 67592 (Nov. 26, 1979) ("BIA Guidelines").[5] See also *In re Roe*, *supra* (citing *Foreman v Heineman,* 240 FRD 456, 474, 500 (D Neb 2006); *In re Walter W*, 744 NW2d 55, 61 (Neb 2008); *In re Welfare of Children of SW*, 727 NW2d 144, 149 (Minn App 2007)). It is critical that this core notice provision in ICWA, which deviates substantially from regular state court procedures, applies to *any* and (presumably) *all* termination petitions. See *Sifers v Horen*, 395 Mich 195, 198-200; 188 NW2d 623 (1971) (defining "any" to mean "every" in Michigan's long-arm statute); *Ali v Federal Board of Prisons*, 552 US __; 128 S Ct 831, 836-37; 169 L Ed 2d 680 (2008) ("We have previously noted that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (quotations and citations omitted). It would be senseless (and arbitrary) to require the state to notify the tribe and the Indian parents of each and every termination petition, but only to require active efforts in the earliest petition. Even more senseless would be a ruling, as is requested by the State in this matter, where active efforts were required in the earliest termination petition three years in the past, but not in the later termination petition involving a different child *and* a different set of circumstances under which the petition arose (here, the incarceration of the father).

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[5] The Guidelines, while nonbinding, have been considered persuasive by Michigan courts. E.g., *In re IEM*, 233 Mich App 438, 445 fn2; 592 NW2d 751 (1999).

Other provisions in ICWA require that "active efforts" be applied with both the temporal and qualitative aspects intact. As Judge Gleicher noted, Congress intended for the State to prove that current and ongoing conditions exist that "'the *continued* custody' of the Indian child by the parent '*is* likely to result in serious emotional or physical damage to the child." Appellant's Appendix at 33a (quoting 25 USC 1912(f) (emphasis added)). Moreover, since the State must prove that its efforts were "unsuccessful" beyond a reasonable doubt,[6] *and* it must prove the Indian parent's *current* unfitness in order to effectuate the removal of an Indian child, it is clear that Congress intended "active" to have both temporal and qualitative meanings.

Through ICWA, Congress sought to prevent the wholesale and automatic breakup of Indian families. 25 USC 1902; *1978 House Report, supra*, at 9. At a bare minimum, giving effect to Congressional intent under ICWA means that a state may not break up Indian families without providing recent active efforts. E.g., *Matter of Morgan*, 140 Mich App 594, 603-04; 364 NW2d 754 (1985) ("Finally, there was no attempt by the petitioner to show that 'active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family' and that 'these efforts have proved unsuccessful.'"); *In re SW*, 727

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[6] A significant plurality of courts from other jurisdictions hold that the state must prove beyond a reasonable doubt that the state has provided active efforts to an Indian family before the state court can break up an Indian family, while other courts apply a variety of lesser state law standards. Native American Rights Fund, *A Practical Guide to the Indian Child Welfare Act* 93 (Boulder: Native American Rights Fund, 2007). A majority of Michigan courts apply the plurality rule. Compare *Matter of Morgan*, 140 Mich App 594, 603-04; 364 NW2d 754 (1985) (applying "reasonable doubt" standard), and *Matter of Kreft*, 148 Mich App 682, 692; 384 NW2d 843 (1986) (same), with *In re Roe, supra,* (applying "clear and convincing" standard). Regardless of the standard of proof, the trial court must make specific fact findings as to active efforts. *Id.* (citing *In re SD*, 236 Mich App 240; 599 NW2d 772 (1999)).

NW2d at 150 (holding that the court would not allow the termination of parental rights where the state provided no active efforts).

B. Alternatively, Assuming this Court Finds that the "Active Efforts" Language is Ambiguous, It Should Still Hold that "Active Efforts" Requires Recent Rehabilitative Efforts to Prevent the Breakup of Cheryl and Jaden Lee.

If, however, this Court still finds the "active efforts" language to be ambiguous, the same result must follow. It is well settled that ambiguous statutes must be interpreted "in light of the harm it is designed to remedy, and strive to apply a reasonable construction that will best accomplish the Legislature's purpose." *Marquis v Hartford Accident & Indem*, 444 Mich 638, 643-44; 513 NW2d 799 (1994). It is also well settled that state courts must interpret ambiguous federal statutes to be consistent with the intent of Congress. *Walters v Nadell*, 481 Mich 377, 381-82; 751 NW2d 431 (2008). It is axiomatic that Acts of Congress intended to benefit Indian tribes and Indian people must be interpreted liberally to give effect to the United States trust responsibility to Indian people. *Montana v Blackfeet Tribe*, 471 US 759, 766; 105 S Ct 2399; 85 L Ed 2d 753 (1985); *In the Interest of CD, supra* 2008 WL 5376534, at *9; *South Dakota ex rel JSB,* 691 NW2d 611, 619 (SD 2005). See generally *Cohen's Handbook of Federal Indian Law* §§ 2.02[1]-[3], at 119-28 (2005 ed).

Finally, given the clear Congressional intent to establish procedural protections for Indian tribes and Indian parents, ICWA's ambiguous provisions should be construed to the benefit of Indian tribes and Indian parents. ICWA is designed to protect and promote the interests of Indian

tribes and Indian families, and should be interpreted in that light. 25 USC 1902. Moreover, Congress found an "alarmingly high percentage" of Indian families being broken up by state agencies and state courts. 25 USC 1901(4), (5). Congress instructed state courts to apply the highest standards designed to protect "the rights of the parent or Indian custodian of an Indian child." 25 USC 1921. In this context, "active efforts" should be interpreted to the benefit of Indian parents, and against the removal of Indian children, by applying the highest procedural protections to Indian parents.

ICWA does not define the term "active efforts,"[7] but Congress's intent in requiring that state agencies provide "active efforts" before the termination of the rights of Indian parents to their children arose out of substantial testimony that state agencies rarely, if ever, provided competent services to Indian parents before state officials took away Indian children. In the House Report accompanying the final version of ICWA, Congress stated that it had been "advised that most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services rarely are provided." *1978 House Report*, *supra*, at 22; see also *State ex rel Juvenile Dept v Charles*, 688 P2d 1354, 1359 (Or App 1984) (noting that the same language in the House Report is "unequivocal"), app dis 701 P2d 1052 (Or 1985). Senator Abourezk stated

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[7] The phrase "active efforts" in the context of preventive and rehabilitative governmental services to families and children in need is "unique in American law." Davis, *In Defense of the Indian Child Welfare Act in Aggravated Circumstances*, 13 Mich J Race & L 433, 442 (2008). As a result of its origins and its function in ICWA, "active efforts" has a "distinctly Indian character." Andrews, *"Active" Versus "Reasonable" Efforts: The Duties to Reunify*

in support of the Senate bill that the "lack of preventive and supportive services on reservations and in urban Indian communities contributes to higher placement rates." 123 Cong Rec 21,043 (June 27, 1977). An Albuquerque area social worker employed by the Bureau of Indian Affairs testified that "State and local governments sluff off [*sic*] their responsibilities to Indians, often by bureaucratic technicalities and thereby avoid providing meaningful services." *1974 Hearings*, *supra*, at 214 (Prepared Statement of Evelyn Blanchard). Most startlingly, one witness testified that in 80 percent of cases in Minnesota, the state had provided no services whatsoever. *1978 Hearings*, *supra*, at 133 (Statement of William Gurneau).

Congress also heard testimony about the passivity of state agencies, in which they would wait for Indian families to reach a crisis point before intervening, and only then to initiate termination proceedings. The National Congress of American Indians testified that state agencies watched and waited as Indian families struggled and declined, only intervening when state workers had determined it was time to remove the Indian children:

> Generally, non tribal government agencies practice crisis intervention. Aware in the incipiency of the presence of factors that frequently lead to family breakup, the agencies often passively observe the corrosive effect of these factors and intervene only when disintegration has reached the point of crisis to seek the legal separation of children from their families. Remedial and rehabilitative services are generally not made available to the Indian family in distress.... [*1977 Hearings*, *supra*, at 137-38]

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the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes, 19 Alaska L Rev 85, 87 (2002).

Calvin Issac testified that active state efforts to prevent the breakup of Indian families could have been successful, if they had been offered in time, but "removal from parental custody is seen as a simple solution." *1977 Hearings*, *supra*, at 156.

And where state agencies did offer services, they were ineffective due to a lack of recognition of the specific cultural needs of Indian people. Task Force Four, covering jurisdictional issues in its report, concluded in its 1976 report to the American Indian Policy Review Commission that "[n]on-Indian public and private agencies ... show almost no sensitivity to Indian culture and society." *Task Force Four*, *supra*, at 87.[8] In the *Wisconsin Potawatomies* case, the Michigan Department of Social Services ignored or rebuffed the repeated efforts of close family members of two Indian children who had been orphaned to keep them in the community. 393 F Supp at 733 ("[T]he court concludes that tribal custom existed, was followed in spirit and largely in practice until frustrated by the actions of the Michigan Department of Social Services....").

Congress's intent in enacting the "active efforts" provision in the Indian Child Welfare Act is clear – before a state court can order the breakup of an Indian family, the party asking for the court's order must prove that it actually provided preventive and rehabilitative services to the Indian family.

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[8] Task Force Four may have been the first entity to publicly recommend to Congress that it require an "affirmative obligation" to state actors to "change all economically and culturally inappropriate placement criteria." *Task Force Four*, *supra*, at 88.

C. Futility – a Judicially Created Exception to the Active Efforts Requirement – May Not Be Used to Thwart the Purposes of ICWA.

In contravention of the plain language of ICWA, which requires "active efforts," the Court of Appeals majority determined that "futility" – a judicially-created, standardless exception to ICWA – may excuse the State from providing active efforts. Appellant's Appendix at 26a.

The court was in error for several reasons. First, ICWA does not provide statutory authority for excusing the State from its responsibility to provide active efforts – the notion of futility does not occur in the statute at all; it is entirely a creature of judicially created common law. 25 USC 1912(d). Congress intended to establish procedural safeguards to prevent the wholesale break up of Indian families, and the creation by courts of common law exceptions to ICWA frustrates that intent. See, e.g., *Michael J v Michael J*, 7 P3d 960, 963 (Ariz App 2000) ("join[ing] a growing number of jurisdictions ... rejecting ... judicially-created exception[s]" to ICWA); cf. *Feyz v Mercy Memorial Hospital*, 475 Mich 663, 678; 719 NW2d 1 (2006) (refusing to create a judicial exception to a statute where the exception is inconsistent with the statute). Moreover, Congress heard testimony in the mid-1970s that state agencies and courts had been taking short cuts in order to reach a court order terminating parental rights, *1974 Hearings*, *supra*, at 62 (noting "few standards" existed to prevent the quick break up of Indian families), persuading Congress to raise a series of procedural safeguards to slow down this process.

"Futility" as used by the Court of Appeals is subjective and limitless, capable of manipulation by both courts and parties that can effectively read "active efforts" right out of the statute. Case in point: after the Court of Appeals issued a decision in this matter, the Sault Ste. Marie Tribe of Chippewa Indians appellate court held in a split decision that Cheryl Lee is entitled to maintain her parental rights and shared custody of two of Cheryl's other three children, years after the same court terminated Cheryl Lee's rights those three children. See *Matter of Shaylynn D*, No. APP-06-04 (Sault Ste Marie Tribe of Chippewa Indians Appellate Court, January 9, 2009) (Appellant's Appendix 119a). This fact demonstrates that for one appellate court it may be "futile" to provide active efforts and thus terminate parental rights, but to another appellate court there might not be enough evidence to terminate parental rights. Finally, there is nothing in the Court of Appeals' interpretation of "active efforts" to provide any reasonable temporal limitation on when efforts should be required, and how long active efforts must be sustained before a court can conclude they are "proved unsuccessful." 25 USC 1912(d). As a result of the Court of Appeals' interpretation, DHS and lower courts might be tempted to construe "active" to include a short burst of activity, followed by years of inactivity, to evade the "active efforts" requirement in ICWA. Surely Congress would not have allowed such a subjective standard as "futility" to undercut ICWA and create these disparate and inconsistent outcomes. *Holyfield*, 490 US at 43-44 (noting that Congress intends uniform national application of its statutes).

Moreover, it is useful to contrast "futility" as rendered in the Court of Appeals with cases in which the parents actively spurned state-provided services. The South Dakota Supreme Court found that the mother in one case rejected attempts by the state social workers to provide services, and found that the state met its burden to show that it made active efforts and those efforts had been unsuccessful. *People in Interest of PB*, 371 NW2d 366, 372 (SD 1985); see also *South Dakota ex rel JSB*, *supra,* at 620 (father "voluntarily absented himself" for several months). Even the incarceration of a parent does not excuse the state from providing active efforts. E.g., *In re DG*, 679 NW2d 497, 502 (SD 2004). Similarly, in *Matter of Kreft*, the then-Michigan Department of Social Services demonstrated to the court that it had provided three years of baby care training to the mother, but she still placed her child in dangerous situations. See 148 Mich App 682, 694; 384 NW2d 843 (1986). These situations – where the parent spurns the efforts of state workers and where recent active efforts have conclusively failed – are truly "futile" situations, a claim that the State can make in proving that "active efforts" have been made and "have proved unsuccessful." 25 USC 1912(d). In this case, however, the Court of Appeals held that the State is entirely excused from providing *any* recent active efforts because of circumstances present three years earlier – circumstances that may have, and in fact have, changed. See *Matter of Shaylynn D, supra.*

Cheryl did not have the opportunity to demonstrate efforts would be successful in this way because she had not been offered any State services for almost three years as to her relationship with Jaden. More importantly, the State would not be able to prove efforts were

"unsuccessful" as required by 25 USC 1912(d) because the State did not make any efforts. The record demonstrates that Cheryl maintained a healthy relationship with her son and shared legal custody for three years. Appellant's Appendix at 90a-91a. Given her relationship with Jaden through the years, in fact, current efforts, or "timely and affirmative steps" to prevent termination were not hopelessly futile, particularly given that this termination proceeding was based on the arrest of Jaden's father, not by any recent or current actions by Cheryl.

In short, the State has sought permission from the court to skip steps, a flashback to the 1970s when the breakup of Indian families was the norm, and state courts absolved state agencies from failing to provide preventive and rehabilitative services to Indian families. *1974 Hearings*, *supra*, at 19-20 (noting that the breakup of Indian families was the "most casual kind of operation..."). Here, DHS asks for a ruling allowing it to ignore ICWA's requirement that it provide active efforts to prevent the breakup of an Indian family. Congress surely would not have countenanced such a result, given its intent to prevent the wholesale and automatic termination of Indian parental rights.

D. The Provisions of the Adoption and Safe Families Act are Inapplicable.

As other state Supreme Courts have done, this Court should hold that the provisions of ICWA are to be interpreted in accordance of Congress's intent and policy toward Indian people, and refuse to incorporate provisions and public policies related to the Adoption and Safe Families Act ("AFSA"). PL 105-89; 111 Stat 2115. In ICWA, Congress intended to dramatically *slow* the process by which state agencies and courts break up Indian families. *1978 House*

Report, supra, at 9; 25 USC 1901(4)-(5) (finding that states contributed to the dramatic removal rates of Indian children from Indian communities); see also 25 USC 1902 (establishing "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture"). AFSA is silent on whether it applies to Indian children or amends ICWA and under the doctrine disfavoring implied repeals, AFSA's provisions intended to make adoptions *easier* simply should not apply to Indian children and families. *Morton v Mancari*, 417 US 535, 549-50; 94 S Ct 2474; 41 L Ed 2d 290 (1974) (relying upon the "cardinal rule ... that repeals by implication are not favored"); see also *Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews,* 65 Fed Reg 4020-01, 4029-30 (January 25, 2000) (interpreting AFSA and concluding that "nothing in this regulation supersedes ICWA requirements").

The Alaska Supreme Court very recently demonstrated the proper distinction between these two statutes by applying the "reasonable efforts" standard required in AFSA to non-Indian children and the "active efforts" standard required to ICWA to Indian children. *Kim B v State, Dept of Health and Social Services, Office of Children's Services*, 2009 WL 225630, unpublished memorandum opinion of the Alaska Supreme Court, issued January 28, 2009 (Docket No. S-13083). Similarly, the Arizona Supreme Court recently held that it would apply state law burdens of proof to state law required findings, but that it would apply the ICWA "beyond a reasonable doubt" standard to findings required by ICWA, just as virtually every other

state court has done. *Valerie M v Arizona Dept of Economic Security*, 198 P3d 1203, 1207 (Ariz 2009) (collecting cases).

III. THE "BEYOND A REASONABLE DOUBT" STANDARD OF 25 USC 1912(f) REQUIRES CONTEMPORANEOUS EVIDENCE THAT THE CONTINUED CUSTODY OF THE INDIAN CHILD BY THE INDIAN PARENT OR CUSTODIAN IS LIKELY TO RESULT IN SERIOUS EMOTIONAL OR PHYSICAL DAMAGE TO THE CHILD BEFORE PARENTAL RIGHTS MAY BE TERMINATED

The "beyond a reasonable doubt" standard of 25 USC 1912(f) requires contemporaneous evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated. In addition, for the state to meet its burden beyond a reasonable doubt, evidence must speak to harm to the particular child and must show that the parent is either unwilling or unable to change the conditions that led to the removal of the child.

The Court of Appeals attempted to modify the requirements of 25 USC 1912(f) by utilizing the judicially created doctrine, "anticipatory neglect." This doctrine is an evidentiary shortcut that undermines the beyond a reasonable doubt standard mandated by Congress fpr termination of parental rights and also prevents the uniformity in the application of ICWA contrary to the United States Supreme Court's holding in *Holyfield.*

A. 25 USC 1912(f) Requires Contemporaneous Evidence that the Continued Custody of the Indian Child by the Parent or Indian Custodian is Likely to Result in Serious Emotional or Physical Damage to the Child.

The Michigan Supreme Court has not previously addressed whether the beyond a reasonable doubt standard of 25 USC 1912(f) requires contemporaneous evidence where the continued custody of the Indian child by the parent is likely to result in serious emotional or physical damage to the child. Other states have ruled that beyond a reasonable doubt standard requires contemporaneous evidence. In *CJ v State of Alaska*, the Alaska Supreme Court determined that current evidence must be shown in order for the State to meet its burden under 1912(f) of the Indian Child Welfare Act. 18 P3d 1214, 1218-1219 (Alas 2001). The father in the case lived in Florida when the children were removed from their mother in Alaska. The Alaska Supreme Court found that in the year leading up to the termination of parental rights, the father did not show an interest in caring for his children and had been out of touch with his children for ten months. *Id.* at 1218. The father argued "his actions and the circumstances which might have led the court to find that the children were in need of aid in 1998 had changed by the time of trial in 1999, and there was no reason to think that his inability or inattention to the task of caring for his children would continue into the future." *Id.* at 1218. The father demonstrated he was successfully parenting another child, he wished to parent the children subject to the proceeding, "*and had taken steps to put himself in a position to do so.*" *Id.* at 1219 (emphasis in original). The Alaska Supreme Court noted the dearth of evidence regarding the current conditions in the

father's home and held that "ICWA requires that a court be able to determine beyond a reasonable doubt that placement of the children with the parent in likely to result in serious damage. The evidence in this case leaves so much uncertainty about C. J.'s [the father's] present circumstances that such a finding cannot be sustained." *Id.* at 1219.

Similarly, the Nebraska Court of Appeals decided a parent's efforts to improve her life must be considered in order to make a ICWA 1912(f) finding "[g]iven that the reasonable doubt standard is very high." *In re Interest of Phoebe S*, 664 NW2d 470, 485 (Neb App 2003). Rebekah S. was removed from her parents in November, 1997, and Phoebe S. was removed at birth in February, 1999. *Id.* at 473, 474. The petition to terminate parental rights stated the parents were unable to discharge parental responsibilities because of mental illness or mental deficiency. *Id.* at 473. At the trial to terminate parental rights, the mother testified that at the time the children were removed from the home she was not on medication and further stated she now consistently takes her medication and it enables her to parent more effectively. *Id.* at 480. The trial resulted in termination of the mother's parental rights. *Id.* at 480. On appeal, the Nebraska Court of Appeals reversed the lower court. In explaining its reasoning, the court contrasted the findings in its current case with an earlier Nebraska Supreme Court ICWA case where "[the mother] has not found the incentive to mature and change her lifestyle over the years this case has been progressing through the juvenile court, when that was the only obstruction to having her children returned to her." *Id.* at 483 (*citing In re Interest of CW*, 479 NW2d 105, 115 (Neb 1992)). The Phoebe S. Court further explained:

> After our de novo review, we find that there is ample testimony that Regina [the mother] has improved her life, her housing situation, her emotional and mental status, her employment, and her parenting skills. We can reach no other conclusion except that her efforts to be a mother to her children have been genuine, sustained, and productive. Unlike in *In re Interest of C.W. et al.*, 239 Neb. 817, 479 N.W.2d 105 (1992), there is no evidence of abandonment, physical abuse, alcohol or narcotic use, or imprisonment. ...
>
> ***
>
> For these reasons, we find that the State has failed to prove beyond a reasonable doubt that if Regina were to gain custody of the girls *at some point in the future*, serious emotional or physical damage to the girls would result. In *State, Dept. of Health v M.L.L.*, 61 P.3d 438 (Alaska 2002), the Alaska Supreme Court held that even though an Indian mother abused alcohol in the past, was diagnosed with mental illness, demonstrated an inability to cope with stress, had limited intelligence, demonstrated poor decision making ability, and generally lacked basic parenting skills, and even though the evidence reflected that the Indian children would suffer serious emotional damage if the bond with their foster parents of 4 years were broken, the State of Alaska failed to prove beyond a reasonable doubt that returning the children to their biological mother would likely cause them severe emotional harm. This record shows that Regina is a far, far better mother than the mother in the Alaska case. Given that the reasonable doubt standard is very high, we conclude that in the instant case, the State's evidence fails to carry its burden of proof. [*Id.* at 939 (emphasis added)]

As Judge Gleicher noted in her concurring and dissenting opinion, *In re Matthew Z* 80 Cal App 4th 545; 95 Cal Rptr 2d 343 (Cal App 2000) provides guidance concerning the contemporaneous requirements of 1912(f). Appellant's Appendix at 35a. In that case, the California Court of Appeals found "[t]he ICWA section 1912(f) finding must be made at, or within a reasonable time before, the termination decision is made." *In re Matthew Z, supra,* at 552. The Matthew Court described the termination of parental rights procedure under California law:

> [A] California court must make the 25 USC 1912(f) finding before it terminates parental rights. The finding generally should be made at the final review hearing at which the Welf. & Inst. Code, 366.26, hearing is scheduled. If this finding was made, a court need not readdress the issue at the subsequent Welf. & Inst. Code, 366.26, hearing, which is focused solely on finding a proper permanent home for the child other than with the parents, *unless the parent presents evidence of changed circumstances or shows that the finding was stale because the period between the hearings was substantially longer than the 120-day statutory period.* [*Id.* at 554-55 (emphasis added)]

The California standard provides a parent with two opportunities to challenge a 1912(f) finding on the basis that the finding was not based on contemporaneous evidence: 1) a parent may present evidence of changed circumstances at any time between the final review hearing and the termination; or 2) a parent may show that the finding was stale, if the time between hearings exceeds 120 days.

In *Matthew Z*, the California Court of Appeal upheld the termination of parental rights, after determining the lower court record showed no need to "make the finding for a second time" based on no improvement in the father's parenting skills and the father's refusal to live with a responsible caretaker. *Matthew Z, supra,* at 555. Nevertheless, the decision requires California courts to consider contemporaneous evidence, either on the basis of changed circumstances or a finding of staleness. Six years later, the California Court of Appeal reinforced the validity of the Matthew requirement that the court consider contemporaneous evidence. In that case, the court held:

> Terri [the mother] raises a valid concern about the length of time between the March 2004 ICWA detriment finding and the February/March 2005 permanency hearing. In Matthew Z., we held that a five-month period between the referral and permanency hearings was not substantially longer than the 120-day statutory period. (*Matthew Z., supra*, 80 Cal.App.4th at 554–555.) Here, obviously, the 11-

> month period between the referral and permanency hearings was substantially longer than the preferred 120-day statutory period. [*In re Barbara R,* 137 Cal App 4th 941, 950; 40 Cal Rptr 3d 687 (Cal App 2000)]

In deciding whether contemporaneous evidence must part of the 1912(f) determination it is important to keep in mind the burden the state must bear. Section 1912(f) of the Indian Child Welfare Act specifically requires that:

> No termination of parental rights may be ordered in such proceedings in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Congress, with the benefit of the expertise of many psychologists and social workers, chose to require 'evidence beyond a reasonable doubt' for termination of Indian parental rights. *1978 House Report*, *supra*, at 22. In fact, the original draft of the Act required clear and convincing evidence for termination of parental rights as well as for removal for foster placement. *Indian Child Welfare Act of 1977*, S Rep 95-597, at 3 (Nov. 3, 1977) (Section 101 (b)). A later draft of the Act required evidence beyond a reasonable doubt prior to any removal in addition to being required during termination proceedings. *1978 Hearings*, *supra*, at 36; *1978 House Report*, *supra*, at 22 ("[T]he committee feels that the removal of a child from the parents is a penalty as great, if not greater, than a criminal penalty."). The standards of proof set forth in the ICWA were carefully chosen by Congress, and they rationally implement congressional intent in preventing the needless breakup of Indian families.

This Court should follow the well established principal that contemporaneous evidence is required for the state to prove beyond a reasonable doubt that continued custody of the Indian

child by the parent is likely to result in serious emotional or physical damage to the child. The Michigan courts have consistently required that child welfare decisions be made with contemporaneous information. With the Congressionally created heightened scrutiny of the Indian Child Welfare Act and the active efforts requirement, this Court should find that a parent's current situation must be investigated by DHS and that evidence considered by the court in order to comply with the requirements of 1912(f).

In addition to the requirement of contemporaneous evidence to meet the beyond a reasonable doubt standard in ICWA cases, Michigan courts have also require the use of contemporaneous evidence in non-ICWA related child welfare matters. *See, e.g., In re Mathers*, 371 Mich 516; 124 NW2d 878 (1963); *In re Pardee*, 190 Mich App 243, 247-248; 475 NW2d 870 (1991); *In re LaFlure*, 48 Mich App 377, 391-392; 210 NW2d 482 (1973) (holding that the superior court should not be restricted to only the information presented to the probate court because "a parent's fitness is not a static concept, much can happen in six months to reflect on that fitness").

In the *Mathers* decision, the Michigan Supreme Court reversed an order terminating the parental rights of the mother, because she was able to provide evidence of current fitness. *In re Mathers, supra,* at 536. The Court stated:

> Assuming neglect was shown from the date of birth to the time alleged in the petition, this had long been erased by her conduct subsequent to this period and prior to the adjudication. During the latter period, she sought vainly the return of her child, which under the circumstances, can hardly be grounds for an order of disposition permanently severing parental rights.

> How can it be said that a mother who rehabilitates herself and then wages an 8-year battle for her own flesh and blood has committed some unpardonable sin which now makes the State master of her destiny and that of her child? Even more unjust would it be for us to say that because 8 years have been necessary to litigate the matter, the door is now barred because mother and child thusly have been too long separated. [*Id.* at 535]

The *Mathers* Court made clear that parental fitness is not a static concept and current information must be taken into consideration when determining whether a parent's fundamental right to keep their family intact should be infringed upon.

The Michigan Court of Appeals also required the use of contemporaneous facts in the *Pardee* case. The Court ruled that res judicata did not bar a second termination proceeding even if respondent had previously prevailed. *Pardee*, *supra* , at 247-248. Mr. Pardee argued that because the state had not met its burden of proving him to be an unfit parent in a prior termination proceeding, the state was barred from seeking to terminate his parental rights at a subsequent time. *Id.* at 247-248. The *Pardee* Court clearly explained that "new facts and changed circumstances" can "alter the status quo" in termination cases. The court found that

> this doctrine cannot settle the question of a child's welfare for all time, nor prevent a court from determining at a subsequent time what is in the child's best interest at that time. Moreover, res judicata should not be a bar to 'fresh litigation' of issues that are appropriately the subject of periodic redetermination as is the case with termination proceedings where new facts and changed circumstances alter the status quo. [*Id.* at 249 (internal citations omitted)]

The Court of Appeals determined that a prior finding that a parent is fit cannot bar the state from seeking to find a parent to be unfit at a later point when "the facts have changed or new facts develop." *Id.* at 248. In so ruling, the court did not restrict introduction of such evidence to one side or the other; petitioners as well as respondents may present evidence of new facts and

changed circumstances. Cheryl Lee is simply asking, and the Indian Child Welfare Act demands, the inverse to be true: a court determination at a previous date does not bar circumstances from changing. Nor does it bar the court from fully considering those changes.

B. In Order For the State to Meet its Burden Beyond a Reasonable Doubt, Evidence Must Speak to Harm to the Particular Child and Must Show that the Parent is Either Unwilling or Unable to Rectify This Conduct.

In order for the state to meet its burden beyond a reasonable doubt, the evidence must speak to harm to the particular child and must show that the parent is either unwilling or unable to rectify this conduct. The ICWA requires that before parental rights to an Indian child can be terminated the state must show that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." 25 USC 1912(f). This standard was appropriated from *Alsager v District Court of Polk County*, 406 F Supp 10 (SD Iowa 1975), aff'd, 545 F2d 1137 (CA8 1976).

The *Alsager* case did not involve an Indian child, but did address the substantive due process requirements for terminating parental rights. The Alsagers argued to the Federal District Court that the Iowa child protection law violated substantive due process because it encroached upon their fundamental right to keep their family intact, and the legislation was not narrowly drawn to express only the legitimate state interest at stake: the interest the state has in protecting children. *Id.* at 32. The court determined that the state's compelling interest in protecting

children is to be "balanced against the parents' countervailing interest in being able to raise their children in an environment free from governmental interference." *Id.* at 33. The court further explained

> [T]ermination proceedings should be distinguished from immediate removal proceedings for purposes of substantive due process analysis. The state's interest in protecting a child from future harm at the hands of his or her parents is clearly less compelling in a situation where the state has already obtained temporary protective custody over the child than in those cases where the supposedly threatened child remains in the parents' home. [*Id.* at 34]

Accordingly, the court determined that to "sustain its compelling interest burden, the state must show that the consequences, in harm to the children, of allowing the parent-child relationship to continue are more severe than the consequences of termination." *Id.* at 36-37. Noting that the termination of the Alsagers parental rights "failed to provide the Alsager children either stability or improved lives," the court elaborated,

> Termination is a drastic, final step which, when improvidently employed, can be fraught with danger. Accordingly, to preserve the best interest interests of both parents and children, the Court deems that termination must only occur where more harm is likely to befall the child by staying with his parents than be being permanently separated from them. [*Id.* at 39]

Because the state failed to meet this burden, the *Alsager* court accordingly found that the parents' substantive due process rights were violated and reversed the termination of their parental rights. *Id.* at 39-40.

That test, first spelled out in the *Alsager* case and adopted by Congress in the ICWA, was deliberately chosen by Congress to implement congressional intent to prevent the needless

breakup of Indian families. The BIA Guidelines speak to Congress' reasoning behind the higher standards of proof, stating that

> [b]y imposing these standards, Congress has changed the rules of law of many states with respect to the placement of Indian children. A child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or that it would be "in the best interests of the child" for him or her to live with someone else. Neither can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be shown that it is dangerous for the child to remain with his or her present custodians. Evidence of that must be "clear and convincing" for placements and "beyond a reasonable doubt" for terminations.
>
> The legislative history of the Act makes it pervasively clear that Congress attributes many unwarranted removals of Indian children to cultural bias on the part of the courts and social workers making the decisions. In many cases children were removed merely because the family did not conform to the decision maker's stereotype of what a proper family should be – without any testing of the implicit assumption that only a family that conformed to that stereotype could successfully raise children. Subsection (c) makes it clear that mere non-conformance with such stereotypes or the existence of other behavior or conditions that are considered bad does not justify a placement or termination under the standards imposed by Congress. The focus must be on whether the particular conditions are likely to cause serious damage. [*BIA Guidelines*, *supra*, at D.3]

The BIA Guidelines summarize much of the Congressional testimony as to what is proper evidence for state courts to consider. Their standard for removal from the home is to

> show the existence of particular conditions in the home that are likely to result in serious emotional or physical damage to the *particular child* who is the subject of the proceeding. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result. [*Id* at D.2 (emphasis added).]

As the Guidelines make clear, evidence must speak to harm to the particular child. In addition, experts are required to speak to the issue of whether the parent is either unwilling or unable to rectify this conduct:

> The first subsection is intended to point out that the issue on which qualified expert testimony is required is the question of whether or not serious damage to the child is likely to occur if the child is not removed. Basically two questions are involved. First, is it likely that the conduct of the parents will result in serious physical or emotional harm to the child? Second, if such conduct will likely cause such harm, can the parents be *persuaded to modify their conduct*? [*Id* at D.4 (emphasis added)]

The Alaska Supreme Court has twice addressed this question regarding the state's 1912(f) burden. Specifically, must the state show potential damage to the *particular* child, and must the state show the parents could not be persuaded to modify their conduct? Both times, the Alaska Supreme Court answered the questions affirmatively. First, in *Alaska v MLL*, the state appealed the lower court's denial of the state's petition to terminate the parental rights of the Ms. Lewis to her two children. *Alaska v MLL*, 61 P3d 438 (Alas 2002). The Court upheld the lower court's decision, stating,

> [t]he superior court was correct to draw a careful distinction between the preponderance of the evidence and clear and convincing standards of proof used in non- ICWA proceedings and the beyond a reasonable doubt standard of proof demanded by ICWA § 1912(f). We hold that, because of the improvements in Lewis's ability to care for her children and the doubt raised by the expert testimony of Drs. Mander and Clarson, the superior court was not clearly erroneous in finding that the state failed to prove beyond a reasonable doubt that granting Lewis custody of the children would "likely result in serious emotional or physical damage to the [children]." [*Id.* at 445]

Second, in upholding the termination of parental rights, the Alaska Supreme Court noted "[t]o prove that E.A.'s custody of H.O. would likely cause him harm, the state must prove both that E.A.'s conduct is likely to harm H.O. and that E.A. is unlikely to change her conduct." *EA v Alaska*, 46 P3d 986, 992 (Alas 2002).

C. The Judicially Created Doctrine of Anticipatory Neglect Cannot Supplant the Statutory Requirements of 1912(f)

Section 1912(f) of the Indian Child Welfare Act requires that a finding to support termination of parental rights be proved beyond a reasonable doubt. 25 USC 1912(f). In a non-ICWA child welfare case, *Santosky v Kramer*, 455 US 745; 102 S Ct 1388; 71 L Ed 2d 599 (1982), the United States Supreme Court discussed the meaning of the beyond a reasonable doubt standard:

> Thus, while private parties may be interested intensely in a civil dispute over money damages, application of a "fair preponderance of the evidence" standard indicates both society's "minimal concern with the outcome," and a conclusion that the litigants should "share the risk of error in roughly equal fashion." 441 U.S. at 423, 99 S.Ct., at 1808. When the State brings a criminal action to deny a defendant liberty or life, however, "the interests of the defendant are of such magnitude that historically, and without any explicit constitutional requirement, they have been protected by standards of proof designed to exclude, as nearly as possible, the likelihood of an erroneous judgment." *Ibid.* The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected, *id.* at 427, 99 S.Ct. at 1810, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself." *Id.* at 424, 99 S.Ct. at 1808. *See also In re Winship*, [397 US 358; 90 S Ct 1068; 25 L Ed 2d 368 (1970)] 397 US at 372, 90 S.Ct. at 1076 (Harlan, J., concurring). [*Id.* at 755 (citing *Addington v. Texas*, 441 US 418; 99 S Ct 1804; 60 L Ed 2d 323 (1979)]

The Court of Appeals, in affirming the lower court's order terminating Cheyl Lee's parental rights rebuffed her claim that current conditions did not support a termination with the recitation that "well established doctrine of anticipatory neglect" negated any need to consider that evidence and determined that the "trial court did not clearly err in relying upon Cheryl Lee's history as one (but not the sole) factor when evaluating" whether the continued custody of Jaden

by Cheryl Lee is likely to result in serious emotional or physical damage to Jaden. Appellant's Appendix at 26a. The Court reasoned that the doctrine of anticipatory neglect, or "how a parent treats one child is probative, though not determinative, of how that parent will treat another, *In re AH*, 245 Mich App 77, 84; 627 NW2d 33 (2001), and past behavior is a strong indicator of future performance," could apply in this ICWA case. Appellant's Appendix at 26a. However, the doctrine is at odds with "society's interests in avoiding an erroneous" decision and its interest in imposing "almost the entire risk of error upon itself." *Santosky*, *supra,* at 755.

The *In re AH* case cited by the Court of Appeals credits *In re Laflure* as the first in the line of cases establishing the "anticipatory neglect" doctrine. *In re Laflure* does not use the term "anticipatory neglect" nor does it have any discussion of the doctrine but it does hold that due process circumscribes presumptions, stating

> [a] parent's right to the custody of his or her children is an element of that "liberty" guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States. *Meyer v Nebraska*, 262 US 390, 402; 43 S Ct 625, 628; 67 L Ed 1042, 1046 (1923); *Pierce v Society of Sisters*, 268 US 510, 535; 45 S Ct 571, 575; 69 L Ed 1070, 1078 (1925); *May v Anderson*, 345 US 528; 73 S Ct 840; 97 L Ed 1221 (1953). The Due Process Clause closely circumscribes the use of presumptions to work a deprivation of liberty. [*Laflure*, *supra*, at 385]

The anticipatory neglect doctrine, as defined by the Court of Appeals is violative of Ms. Lee's liberty interest and, accordingly, has no place in the 1912(f) detrimental determination, let alone being the primary or only evidence weighed. As Judge Gleicher noted in her concurring and dissenting opinion, this doctrine of "anticipatory neglect" was the sole justification for the affirmation:

> Here, however, respondent's past behavior *did* qualify as determinative because neither petitioner nor the circuit court considered current evidence. Rather, respondent's past behavior functioned not only as a "strong indicator" of future performance, but constituted the *only* evidence of future performance. [Appellant's Appendix at 36a (emphasis in original]

As a creation of the Michigan judiciary this doctrine cannot supplant the Congressionally created statutory requirements of 1912(f), let alone be the sole evidence weighed. This evidentiary shortcut cannot circumvent the stringent requirements of ICWA, "given the reasonable doubt standard is very high." *In re Interest of Phoebe S, supra*, at 485.

The lower court's reliance upon the doctrine of anticipatory neglect is per se antithetical to what is required by Section 1912(f). In applying the ICWA the United States Supreme Court has made it clear that only uniform national standards should govern application of the Act and that varying standards of individual states should not apply. *See Holyfield, supra*, at 43. In *Holyfield* the Supreme Court eschewed the notion that the application of the federal Indian Child Welfare Act should vary from state to state dependent upon state definitions of domicile. The Court there was faced with a jurisdictional question of whether a Mississippi state court could exercise jurisdiction over a voluntary adoption proceeding involving Indian children who were born off an Indian reservation to Indian parents domiciled on an Indian reservation. The Mississippi Supreme Court, utilizing state law, held that the domicile of the children was off the reservation and upheld jurisdiction. *See Matter of BB*, 511 So2d 918 (Miss 1987). The Supreme Court rejected the notion that the Indian Child Welfare Act should be interpreted by reference to state law, finding that nothing in ICWA indicated a congressional intent to make the application of ICWA dependent upon state law. *Holyfield, supra,* at 43. The Court stressed that the standards

of ICWA should have uniform nationwide application, *id.,* and that there is a presumption against the application of state law to federal statutes if the "federal program would be impaired" by the application of state law. *Id.* at 44.

Justice Brennan, writing for the *Holyfield* majority, described unacceptable ramifications of permitting ICWA to be applied based on state law definitions and interpretations. He pointed out in certain states, state courts would have jurisdiction over the Holyfield adoption proceeding; in other states, they would not. This result was intolerable, the Court concluded, because ICWA would be applied differently from state to state.

The same intolerable situation would result occur if this Court were to rule that Section 1912(f) of ICWA did not require evidence that is current, that speaks to harm to the particular child, and that shows that the parent is either unwilling or unable to change the conditions that led to the removal of the child. The "anticipatory neglect" doctrine allows for reliance on past harms sustained by other children, which is in opposition to the requirements under 1912(f). This doctrine is a state creation and there is only evidence of its usage in Michigan and Illinois. Appellant's Appendix at 36a. As such, this evidentiary shortcut should not be allowed to circumvent the requirements of 1912(f). In order for the state to meet its burden beyond a reasonable doubt "that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child" evidence must be contemporaneous, must speak to harm to the particular child, and must show that the parent is either unwilling or unable to change the conditions that led to the removal of the child.

Cheryl Lee provided evidence she successfully completed chemical dependency treatment, had a stable relationship and housing, and had an on-going healthy relationship with her child. Further, the state provided no current evidence to suggest that she was unamenable to change any prior conduct that brought her within the jurisdiction of the court. At a minimum these facts create reasonable doubt that continued custody by Ms. Lee is likely to result in serious emotional or physical damage to her child. Instead of finding the state had not met its burden, the trial court relied upon speculative testimony concerning how Ms. Lee might respond to services. In its summary of basic facts of the case, the Court of Appeals pointed to the testimony of a social worker supervisor: Melissa VanLuven was a supervisor of Jill Thompson and, accordingly, had not provided services directly to Ms. Lee. See Appellant's Appendix at 21a-22a. "VanLuven stated that she felt qualified to deduce how Cheryl Lee *would* respond to current services *had* they been provided..." *Id.* (emphasis added). Jill Thompson, a worker with the Sault Ste. Marie tribes Binogii Placement Agency, "opined that she could judge Cheryl Lee's current ability to manage children and a house *based on how things were before*." *Id.* at 21a (emphasis added). Thompson had not provided services to Cheryl Lee since August 2005. *Id.*

In service of the speculative evidence the Court of Appeals applied the doctrine of anticipatory neglect when it affirmed the lower court's order. However, to meet its burden beyond a reasonable doubt that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," the State must show that continued custody would likely cause serious harm to the *particular* child and that Ms. Lee is

unlikely to change her conduct. The State did not provide sufficient evidence and the evidence presented by Ms. Lee was, as a matter of law, sufficient to create reasonable doubt. Accordingly, the order terminating Ms. Lee's parental rights cannot stand because it violated 25 USC 1912(f).

CONCLUSION

Amicus Curiae American Indian Law Section of the State Bar of Michigan respectfully requests this Court to reverse the decision of the Court of Appeals.